

FEDERAL MAGISTRATES COURT OF AUSTRALIA

HO v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1285

MIGRATION – Spouse visa – MRT – whether Tribunal erred in considering relevance of grant of temporary visa – whether Tribunal failed to consider statutory presumption of strong evidence – whether Tribunal failed to give particulars of information forming part of reasons for decision.

Migration Act 1958 (Cth), s.359A

Migration Regulations 1994 (Cth) rr.1.15(A), 801, 802

Minister for Immigration & Multicultural Affairs v Assif [2000] FCA 228

Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration [2001] HCA 30

Ertan Ozbunbar v Minister for Immigration & Multicultural Affairs [1998] FCA 1086

Applicant:	THI XUAN NGA HO
Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS & ANOR
File Number:	MLG 1377 OF 2005
Judgment of:	Phipps FM
Hearing date:	16 June 2006
Date of Last Submission:	16 June 2006
Delivered at:	Melbourne
Delivered on:	1 September 2006

REPRESENTATION

Counsel for the Applicant:	Mr Niall
Solicitors for the Applicant:	Clothier Anderson & Associates
Counsel for the Respondent:	Mr Gilbert
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

- (1) There be an order in the nature of certiorari that the decision of the second respondent made on 10 October 2005 upholding the decision of the delegate of the first respondent to refuse the applicant the grant of a spouse visa, be set aside.
- (2) There be an order in the nature of a writ of mandamus remitting the matter to the second respondent and requiring that the second respondent hear and determine the matter according to law.
- (3) The respondent pay the applicant's costs fixed at \$6,500.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 1377 OF 2005

THI XUAN NGA HO
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
& ANOR**
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant applied for a Partner (Residence) (Class BS) Visa on the basis of her marriage to an Australian permanent resident. The visa was refused and the refusal affirmed by the Migration Review Tribunal. The applicant now applies for prerogative writs to quash and remit the decision.

Background

2. The applicant is a national of Vietnam. She came to Australia on a student visa. She married the nominator in Melbourne on 29 August 1999. The nominator, who was born in Vietnam, is an Australian permanent resident.

3. The applicant applied for a temporary subclass 820 visa on 25 November 1999. The application included an application for a permanent subclass 801 visa. The temporary visa was granted on 15 June 2000 by a delegate of the Minister.
4. A requirement for the permanent visa is that 2 years should pass after the grant of the temporary visa. However, it was not until 2 April 2004 that a delegate of the Minister refused the application for a permanent visa. The Migration Review Tribunal affirmed the decision to refuse the application on 10 October 2005.

The Tribunal's decision

5. The Tribunal referred to the grant of the temporary visa. It said the file note indicates that the parties were interviewed by the delegate on 12 April 2000 and she was satisfied that they were in a genuine ongoing relationship.
6. The Tribunal set out a list of documents supplied by the applicant and the nominator. It then described a visit on 12 March 2003 by Department officers to the applicant's listed address. The address is the home of the nominator's uncle. Neither the applicant nor the nominator were at home. The nominator's uncle showed the officers a bedroom which he stated was occupied by the applicant and the nominator. They advised the nominator's uncle that they were not satisfied that the bedroom was occupied by the applicant as there were no visible female items in the bedroom.
7. On 18 April 2003 Department officers interviewed the applicant and the nominator. During the home visit, officers could not find any personal belongings or cosmetics that would belong to the applicant. The nominator's response was that the applicant's cosmetics were kept in the bathroom and her clothing and suitcase in the locked wardrobe. The applicant stated that the wardrobe contained her clothing, the nominator's clothing, her underwear and personal documents.
8. The department officers who conducted the first visit revisited on 3 December 2003. The nominator's uncle, accompanied by a little boy who was his son, opened the door.

9. The nominator's uncle showed the officers into the parties' bedroom. The officers noted it contained the same furniture and a locked wardrobe. The officers noted a photograph of what appeared to be the nominator and the visa applicant, but on closer inspection the officers noted that the female in the picture was not the applicant. The uncle's son stated "Uncle Thong and Auntie Ut stayed here". The boy said the female in the picture was Auntie Ut. The officers asked the boy where the applicant slept to which he answered "Next door, my brother's room". The officers requested the uncle to show them the other room.
10. It contained a single bed, female cosmetics and several letters. Next to the single bed, that the boy indicated was the visa applicant's, was some female clothing in the basket. The officers asked the uncle if the cosmetics and female clothing belonged to the visa applicant to which he replied "you see what you get".
11. The Tribunal convened a hearing on 1 August 2005. The applicant said she had lived at the same address for six years. She said she lived with her husband his uncle, aunt and their two sons aged 22 and 7.
12. The Tribunal asked the applicant about the file notes regarding the home visits and queried why the officers of the Department had found no female belongings in the room which she and the nominator were stated to be sharing. The applicant said she had taken all her clothes into the next room for ironing and storage. The Tribunal asked about the second visit when the officers had seen her belongings in the third bedroom. The applicant said the room was very small and the light in the other room was better so she had put the basket of clothes in the third room for ironing. The Tribunal asked her about the statement by the little boy that she had been sleeping there. She stated that she sometimes cuddled him in there.
13. The criteria for a permanent spousal visa are set out in clause 801.221 of the *Migration Regulations 1994* (Cth). Relevantly, clause 801.221(2) (c) requires that the applicant is the spouse of the nominating spouse. The definition of spouse is set out in r.1.15A. Regulation 1.15A (1A) describes the married relationship and r.1.15(3) sets out mandatory considerations. Regulation 1.15A (1A) provides:

Persons are in a married relationship if:

- (a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*

14. The Tribunal considered there were few joint receipts to indicate a long standing marital relationship. The Tribunal referred to the applicant's admission that she had a gambling problem but had concealed it from the nominator. She had withdrawn money from their joint account. She had taken the key card of the nominator while he was at work and gambled at the casino. She had borrowed a lot of money from relatives and friends to gamble.
15. The Tribunal found that the applicant's dishonesty with the nominator concerning her gambling brought her commitment to the relationship into question. It considered that the financial aspects, particularly the fact that the visa applicant had been gambling with the nominator's money without his knowledge or consent, the structure of their bank accounts and the fact that the nominator owned the home solely in his own name, did not support the existence of a spousal relationship or a finding that they were mutually committed to live together as husband and wife.
16. The Tribunal referred to a letter it sent to the applicant pursuant to s.359A of the *Migration Act 1958* (Cth) inviting comment on certain information. It then referred to the two visits by department officers to the applicant's stated address and their observations. The Tribunal said it found information provided by the Departmental officers to be more

compelling than the evidence given at a hearing or the submissions made by the migration agent. It considered there was little evidence that the visa applicant and the nominator were sharing a room and there was little evidence of the applicant actually residing at the residence which was claimed to be the address she shared with the nominator.

17. The Tribunal said that the visits by the Departmental officers demonstrated that even if the visa applicant was residing at the stated address, she and the nominator were not sharing the same room or living as husband and wife. The Tribunal said that none of the evidence provided since that time satisfied the Tribunal that circumstances had changed in the meantime.
18. The Tribunal was not satisfied that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship between them was genuine and continuing nor that they lived together or did not live separately and apart on a permanent basis.

The applicant's arguments

19. The applicant's amended application alleges jurisdictional error:
 - a) the Tribunal failed to take into account that the applicant was granted a subclass 820 visa credit on the basis that she and the nominator were spouses within the meaning of the *Migration Regulations* at the time of application for the subclass 820 visa;
 - b) the Tribunal failed to take into account the strong evidentiary basis provided by r.1.15A(5);
 - c) the Tribunal made findings inconsistent with the grant and holding by the applicant of a subclass 820 visa;
 - d) in approaching the issue of the applicant's gambling and the use of funds from the joint account without the knowledge of the nominator, the Tribunal failed to have regard to the context of the couples' prior relationship, including the grant of the subclass 820 visa;

- e) the Tribunal failed to comply with s.359A by failing to provide to the applicant:
 - i) particulars of the information provided to Departmental officers at the second home visit at the applicant's home on 3 December 2003;
 - ii) sufficient particulars of the photographs relied on by the Tribunal so as to allow the applicant to respond to the allegations concerning them.

Failure to take into account subclass 820 visa

- 20. The first and third grounds concern the manner in which the Tribunal treated the applicant's temporary spouse visa, a subclass 820 visa.
- 21. A subclass 820 visa has criteria to be satisfied both at the time of application and the time of decision. A subclass 801 visa has criteria to be satisfied at time of decision only. One of the requirements for a subclass 801 visa is that the applicant is the holder of a subclass 820 visa.
- 22. The applicant submits that the Tribunal is not permitted to go behind the grant of the subclass 820 visa and to make a finding that the applicant and the nominating spouse were never in a genuine relationship or to make findings inconsistent with both the grant (and the holding) of a subclass 820 visa on that basis.
- 23. Alternatively, the applicant submits that the fact that the applicant has been accepted by the Minister to have been the spouse of the nominator at the time of application (and the continued holding of the subclass 820 visa) is a relevant consideration which the Tribunal must take into account in reaching a decision on the subclass 801 visa.
- 24. The applicant's submission points to this passage in the Tribunal's reasons:

In relation to the nature of the household, although the parties have claimed to live together for six years, the nature of that household does not support that this has been in the context of a marital relationship. The parties continue the living

arrangements in which the nominator lived before he was married. Consequently there are no joint rent receipts, no joint bills and little reliable evidence that housework is shared.

25. In *Re: Peko-Wallsend Ltd and others v: Minister for Aboriginal Affairs and Northern land Council* 5 FCR 532 the Full Court of the Federal Court said at 538:

The question raised by the appellants' primary argument is whether the Minister's decision was an invalid exercise of the power conferred by s.11 of the Land Rights Act because of a failure to take into account a relevant consideration. The basic principles governing judicial review on this ground are not in dispute. In Associated Provincial Picture Houses Limited v Wednesday Corporation (1948) 1 K.B. 223 at p.228, Lord Greene M.R. set out the principle in these terms:

"The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those irrelevant collateral matters."

26. The relevant regulations require the Tribunal to determine whether the applicant was the spouse of the nominator, as that is defined in r 1.15A, at the time of decision. The applicant's first argument is, in effect, that the Tribunal must accept the Minister's decision on the subclass 820 visa as correct. If the argument is correct it means that the Tribunal, no matter what the evidence before it is, must accept that at time of decision for the subclass 820 visa the applicant met the requirements for spouse in regulation 1.15A.
27. This requirement is not contained in regulation 801 setting out the requirements for a subclass 801 visa. If the applicant's argument is correct then it must be a requirement by implication. A requirement is that the applicant is the holder of a subclass 820 visa. It is a long step to imply a requirement that the Tribunal must accept that the requirements of regulation 1.15A were met at the time that visa was granted.

28. The Tribunal must consider the requirements of regulation 1.15A. It must consider whether they are satisfied at the time of decision. Necessarily that involves looking at the history of the relationship between the applicant and the nominator. Usually that will require an understanding of the relationship at the time of and before the grant of the subclass 820 visa. The Tribunal may have, and often will have, different and additional evidence bearing on the parties' relationship at the time of the grant of the subclass 820 visa. It must make its own assessment of this evidence. To say that it must accept as correct a previous decision based on different evidence is inconsistent with this requirement.
29. The second argument put is that the granting of the subclass 820 visa is a relevant consideration to be taken into account by the Tribunal in deciding whether the applicant is the spouse of the nominator.
30. The Tribunal refers to the granting of the subclass 820 visa under the heading "Evidence". Under the heading "Findings and Reasons", except for the passage referred to above, it discusses events which occurred following the grant of the subclass 820 visa. The Tribunal must consider the existence of a subclass 820 visa because it is an essential requirement for the grant of a subclass 801 visa. Other than that, there is no express requirement to consider its existence in determining whether the applicant is the spouse of the nominator.
31. There is no implied requirement of the sort discussed in *Peko Wallsend*. Regulation 1.15A(3) requires the Minister, and so the Tribunal, to have regard to all the circumstances of the relationship, and details a number of matters which this requirement includes. They concern the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the commitment to each other. Nothing suggests that a consideration of the existence of the subclass 820 visa is an essential matter to be taken into account.

Regulation 1.15A(5)

32. Regulation 1.15A(5) provides:

If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

33. In *Minister for Immigration & Multicultural Affairs v Assif* [2000] FCA 228 the full Court of the Federal Court said at [23]:

This sub regulation creates something in the nature of a statutory presumption of the existence of a genuine marital relationship between the visa applicant and spouse, where they have cohabited for at least six months: such cohabitation is taken to be "strong evidence" that the relationship is genuine and continuing.

34. Under the heading "Findings and Reasons" the Tribunal sets out sub regulations (1), (1A), and (2) of regulation 1.15A, but not sub regulation (5). Since the sub regulation creates something in the nature of a statutory presumption, it is something which the Tribunal must consider. The Tribunal does not refer to the sub regulation. The Tribunal does not make a clear finding either way whether the applicant lived at the same address as the nominator. The closest is this passage:

The Tribunal has considered the submissions made by the migration agent and the evidence given at hearing. However the Tribunal finds the information provided by the Departmental officers in their visits to be more compelling in that there was little evidence that the visa applicant and the nominator were sharing a room, there were some (but few) female items in the house and there was little evidence of the visa applicant actually residing in the residence which was claimed to be the address which she shared with the nominator.

The visits by the Departmental officers demonstrated that even if the visa applicant was residing at the stated address, she and the nominator were not sharing the same room nor living as husband-and-wife.

35. In *Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration* [2001] HCA 30, McHugh, Gummow and Hayne JJ said at [82]:

It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the

consequences that follow from a decision-maker making such an error. As was said in Craig v South Australia[50], if an administrative tribunal (like the Tribunal)

"falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

"Jurisdictional error" can thus be seen to embrace a number of different kinds of error; the list of which, in the passage cited from Craig, is not exhaustive [51]. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

36. The Tribunal has either identified a wrong issue or ignored relevant material. It has not considered the statutory presumption in sub regulation (5), at least in the sense that it has not turned its mind to whether it was necessary to consider the statutory presumption. It should have turned its mind to the issue whether the applicant had resided at the same address as the nominator for six months. If it found she had not, then the statutory presumption did not apply. If it found that she had then it had to consider the effect on its findings of the strong evidence that the relationship is genuine and continuing. If it decided it could not make a finding on this issue, it had to consider what, if any, consideration it should give to r 1.15A(5). Its failure to consider the sub regulation is a jurisdictional error.

The wife's gambling

37. The Tribunal considered that the wife's concealment of her gambling from the nominator and the dishonesty in the use of money for gambling showed that there was not a genuine and continuing relationship.
38. The applicant argues that the Tribunal failed to have regard to the context of their prior relationship, including the grant of the subclass 820 visa. The prior relationship includes the grant of the subclass 820 visa, and that the gambling had been a problem for two years preceding the decision. The applicant's argument refers to *Ertan Ozbunbar v Minister for Immigration & Multicultural Affairs* [1998] FCA 1086.
39. The treatment by the Tribunal of the existence of the subclass 820 visa has been dealt with already. This case is different to Ozbunbar. There, after the marriage the nominator was confined to hospital as a psychiatric patient. That was her circumstance at the time of the hearing. The Court said that the Tribunal had erred in not considering the relationship between applicant and nominator at the time of the hearing in the context of the relationship prior to the nominator being confined to hospital.
40. Here, the Tribunal has found that the relationship between the parties at the time of the marriage was similar to the relationship at the time of decision. It is a different case. The argument is, in effect, a repeat of the argument, that the Tribunal should have assumed the correctness of the decision on the subclass 820 visa.

Section 359A

41. Section 359A of the *Migration Act 1958* (Cth) requires the Tribunal to give the applicant particulars of any information it considers would be the reason, or part of the reason for affirming the decision under review.
42. The Tribunal sent the applicant a letter dated 8 December 2004. It referred to the visit on 3 December 2003 in this way:

On 3 December 2003 officers that conducted the first home visit revisited the recorded home address of the nominator and visa

applicant. The nominator's uncle showed officers into the parties' bedroom. Officers noted some small photographs and a larger photograph of what appeared to be the nominator and visa applicant however then noted that the female in the picture was not the visa applicant. Some female clothing was in a basket on the other room.

43. Under "Evidence" the Tribunal recorded what the officers had noted. This was more than contained in the letter of 8 December 2004. In particular, the officers described what the uncle's son had said about where the applicant slept.
44. Under the heading "Findings and Reasons" the Tribunal said that it found the information provided by the Departmental officers in the visits to be more compelling. The Tribunal referred to the officers observations about the bedrooms, but did not, in this section, refer to what had been said by the uncle's son.
45. The applicant's argument is that the Tribunal's recording of the officers observations of what was said by the uncle's son, and its finding that it found their evidence more compelling, means that the officers observations about what was said by the uncle's son is part of the Tribunal's reason for affirming the decision under review.
46. Under the heading "Findings and Reasons" the Tribunal does not refer to what was said by the uncle's son. This is referred to only under the heading "Evidence". A proper reading of the Tribunal's decision is that it did not take into consideration the officers' observations about the uncle's son in reaching its decision. There has been no breach of s.359A.
47. The applicant submits that while the Tribunal referred to the officers' observations of photographs in the letter of 8 December, it did not give sufficient particulars of the photographs. The applicant's argument refers to the nominator's evidence to the Tribunal that without knowing more about the photographs he could not comment on them.
48. The answer to this argument is that the Tribunal has given the best particulars it can. The information that the Tribunal had available to it was the officers' observations. Their observations were that they saw photograph's, one of two people, one being the nominator and the other

another woman who was not the applicant. That is the only information the Tribunal had about the photograph.

49. It is clear from the letter that the Tribunal considers that it is the officers' recorded observations about the photograph which the Tribunal considered might be the reason or part of the reason for its affirming the decision under review. It is not the photograph itself because the Tribunal did not have the photograph. In these circumstances the Tribunal has complied with its obligation under s.359A.
50. The failure to consider the effect of r.1.15A(5) means the decision must be set aside and remitted for reconsideration.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Phipps FM

Associate:

Date: 1 September 2006